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Nos. 14-556, 14-562, 14-571, and 14-574

In the Supreme Court of the United States

JAMES OBERGEFELL, et al., Petitioners,

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, et al., Respondents.

VALERIA TANCO, et al., Petitioners,

v.

BILL HASLAM, GOVERNOR OF TENNESSEE, et al., Respondents.

APRIL DEBOER, et al., Petitioners,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, et al., Respondents.

GREGORY BOURKE, et al., Petitioners,

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, et al., Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF 57 MEMBERS OF U.S. CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are 57 Members of the United States Senate and the United States House of Representatives. A complete list of *amici curiae* is provided in the Appendix to this Brief.

As Members of Congress, *amici* have a compelling interest in defending the principles of federalism and the separation of powers implicated in these cases. Federalism and the separation of powers provide critical structural guarantees of the liberty of all American citizens, including *amici*'s constituents. *Amici* thus have an interest in defending the division of authority between the federal government and the States, and in preserving the separation of powers between this Court and the political branches. *Amici* believe that a judgment of this Court imposing a judicially mandated revision of state laws defining marriage would circumvent the proper resolution of these profound and divisive issues through state democratic processes. Such a decision could damage the rights of a self-governing people. It would set an unwarranted precedent, with effects far beyond this case, of federal encroachment into a traditional area of state concern, and of judicial pre-emption of an

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* represent that, in consultation with *amici*, they authored this brief in its entirety and that none of the parties or their counsel, nor any person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represent that all parties have consented to the filing of this brief. Counsel for all petitioners have provided written consent to counsel for *amici curiae*, and counsel for all respondents have filed notices of blanket consent with this Court.

area that the Constitution allots to democratic process. *Amici* therefore have filed this brief in support of Respondents and requesting affirmance.

SUMMARY OF THE ARGUMENT

Federalism and the separation of powers exist to preserve liberty. By adopting a system of federalism, the Founders "split the atom of sovereignty" and thus enhanced freedom. *U.S. Term Limits* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). By separating the judicial power from the executive and legislative powers wielded by the political branches, the Founders sought to create "a government of laws not of men." MASS. CONST. art. XXX. These structural guarantees of liberty urge this Court to permit the States and their People, not this Court, to decide the profound question whether to retain or jettison the definition of marriage as the union of one man and one woman—a definition that has been almost universally accepted by polities across the centuries.

I. This Court should tread with "the utmost care" when confronting novel expansions of liberty and equality interests. *Washington* v. *Glucksberg*, 521 U.S. 702, 720 (1997). Seven principles of federalism and judicial restraint, repeatedly emphasized in this Court's cases, all counsel this Court to exercise caution and to avoid imposing a judicially mandated redefinition of marriage on the States.

First, out of deference to the States as separate sovereigns in our system of federalism, this Court should be reluctant to intrude into areas of traditional state concern, especially the law of marriage and domestic relations. In *United States* v.

Windsor, 133 S. Ct. 2675 (2013), this Court emphasized the States' authority to define and regulate the marriage relation without interference from federal courts. "Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations," including "the definition of marriage." *Id.* at 2691. This principle of federalism counsels against judicial intrusion into a traditional enclave of state authority.

Second, out of respect for the States' role as laboratories of democracy, this Court should be loath to short-circuit democratic experimentation in domestic social policy. State democratic processes, not federal courts, are the fundamental incubators of change in public policy and social structure. The democratic process is fully competent, and better equipped than the federal judiciary, to mediate and resolve such "difficult and delicate issues." *Schuette* v. *Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1636 (2014) (plurality opinion). "Democracy does not presume that some subjects are either too divisive or too profound for public debate," *id.* at 1638, and neither should this Court.

Third, this Court should exercise caution before upholding new constitutional claims in the "unchartered" territory of substantive due process, where "guideposts for responsible decisionmaking ... are scarce and open-ended." *Glucksberg*, 521 U.S. at 720. In this context, the "unchartered" nature of inquiry raises particular concerns about how to draw principled boundaries for the institution of marriage. Guideposts for federal courts seeking to define the boundaries of marriage will be "scarce and open-

ended" as new attempts arise to broaden the definition of marriage beyond same-sex couples. *Id.*

Fourth, this Court should be reluctant to redefine marriage in the absence of a close nexus between the asserted constitutional claim and the central purpose of an express constitutional provision. Redefining marriage to include same-sex relationships does not fall within the "clear and central purpose" of any express constitutional provision, *Loving* v. *Virginia*, 388 U.S. 1, 10 (1967), and thus it should be considered with great caution and restraint.

Fifth, this Court should consider that the definition of marriage is currently the subject of active debate and legal development in the States. "The public is currently engaged in an active political debate over whether same-sex couples should be allowed to marry." *Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2659 (2013). This Court's cases and judicial prudence counsel against short-circuiting such ongoing debate and legal development in the States.

Sixth, this Court prefers incremental change to sweeping and dramatic change when confronting claims extending the definition of constitutional rights. Imposing a federally mandated redefinition of marriage on the States would constitute a sweeping change. It would impliedly invalidate the recently adopted policies of 31 States favoring the definition of marriage as one man and one woman, and would contravene this Court's historically preferred analysis. Indeed, many lower federal courts have already overreached their authority in purporting to invalidate many of these state laws.

Seventh, this Court should consider whether redefining marriage to include same-sex relationships is novel within our Nation's history and tradition, or conversely, whether the government's attempt to restrict the right is novel. In this case, there has been a long tradition favoring the traditional definition of marriage, which has been reaffirmed in democratic enactments adopted by a majority of States over the past 15 years. The redefinition of marriage to include same-sex couples, by contrast, is of novel vintage.

Because all seven of these well-established guideposts for the exercise of judicial restraint point in the same direction, this Court should not hold that the federal Constitution imposes a novel, federally mandated redefinition of marriage on all fifty States.

II. The States' traditional authority over marriage and domestic relations plainly encompasses the power of one State to refuse to recognize a marriage, validly contracted in another jurisdiction, that violates the public policy of the forum State. This public-policy exception to the place-of-celebration rule is as old as the rule itself. States have invoked this exception to refuse to recognize marriages that violated forum policies against polygamy and bigamy, underage marriage, consanguinity, and certain forms of remarriage after divorce. The States thus possess the traditional authority to refuse to recognize same-sex marriages celebrated and recognized in other States. The same principles of federalism and judicial restraint counsel this Court not to "embark upon the enterprise of constitutionalizing choice-of-law rules, with no compass to guide us," *Sun Oil Co.* v.

Wortman, 486 U.S. 717, 727-28 (1988), but to allow state courts applying state law to determine the validity of same-sex marriages contracted in other States.

ARGUMENT

Federalism and the separation of powers exist to preserve liberty. Federalism, which divides and allocates power between the federal government and the States, constitutes "our Nation's own discovery. The Framers split the atom of sovereignty." *U.S. Term Limits* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). Federalism arose from the "counter-intuitive . insight of the Framers that freedom was enhanced by the creation of two governments, not one." *United States* v. *Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring).

Likewise, the Framers separated power horizontally among the three branches of the federal government in order to preserve liberty. "[T]he preservation of liberty requires that the three great departments of power should be separate and distinct." THE FEDERALIST NO. 47, at 301 (C. Rossiter ed. 1961) (J. Madison). "No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty ." *Id.* The Framers separated the judicial, executive, and legislative powers "to the end it may be a government of laws and not of men." MASS. CONST. art. XXX.

By posing the question "who decides?", *DeBoer* v. *Snyder*, 772 F.3d 388, 396 (6th Cir. 2014), these cases directly implicate the structural principles of divided and limited government. This Court has

long been vigilant against unwarranted incursions of federal authority into traditional enclaves of state power, such as domestic relations. *See United States* v. *Windsor*, 133 S. Ct. 2675, 2691 (2013). Similarly, this Court consistently has emphasized the need for judicial restraint to avoid supplanting democracy and state political processes with ill-considered "court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues." *Schuette* v. *Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1636-37 (2014) (plurality opinion). This Court's jurisprudence demonstrates that the States and their People should decide the "difficult and delicate issues," *id.*, concerning the radical redefinition of marriage proposed in these cases.

I. Seven Principles of Federalism and Judicial Restraint Call for this Court to Exercise the "Utmost Care" in Considering Novel Constitutional Claims, and These Principles Uniformly Counsel Against Requiring the States to Redefine Marriage.

In deference to principles of federalism and judicial restraint, this Court treads with "the utmost care" when considering novel liberty and equality interests. *Glucksberg*, 521 U.S. at 720 (quoting *Collins* v. *City of Harker Heights*, 503 U.S. 115, 125 (1992)); *see also District Attorney's Office for the Third Judicial Dist.* v. *Osborne*, 557 U.S. 52, 73, (2009) (same). "The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we

are asked to break new ground in this field." *Collins*, 503 U.S. at 125.

Seven guideposts of federalism and judicial restraint, repeatedly invoked in this Court's cases, counsel for the exercise of "the utmost care" and "judicial self-restraint" in this case. These principles uniformly counsel that this Court should not impose a federally mandated redefinition of marriage on the States, but should allow the States and their People to decide the definition of marriage. Anything else would constitute an unwarranted judicial intrusion upon the power of the people and a circumvention of the well-established structural guarantees of the liberty of Americans.

A. Federalism and Deference to the States as Sovereign in the Field of Domestic Relations Counsel this Court to Permit the States to Decide the Definition of Marriage.

"[O]ur federalism" requires that the States be treated as "residuary sovereigns and joint participants in the governance of the Nation." *Alden* v. *Maine*, 527 U.S. 706, 748 (1999) (Kennedy, J.); *see also Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011) (recognizing "the integrity, dignity, and residual sovereignty of the states"). "By 'splitting the atom of sovereignty,' the founders established 'two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.'" *Alden*, 527 U.S. at 751 (quoting *Saenz* v. *Roe*, 526 U.S. 489, 504 n.17

(1999)); *see also Printz* v. *United States*, 521 U.S. 898, 920 (1997).

Federalism, which "was the unique contribution of the Framers to political science and political theory," rests on the seemingly "counter-intuitive insight of the Framers that freedom was enhanced by the creation of two governments, not one." *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring). Federalism, combined with the separation of powers, creates "a double security ... to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *Id.* at 576 (quoting THE FEDERALIST NO. 51, at 323 (C. Rossiter ed. 1961) (J. Madison)).

Over the long run, federal intrusion into areas of state concern tends to corrode the unique security given to liberty by the American system of dual sovereignties. "Were the Federal Government to take over the regulation of entire areas of traditional state concern . . the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring).

For these reasons, this Court is hesitant to project its authority into areas of traditional state concern. *See, e.g., Osborne*, 557 U.S. at 73 n.4 (rejecting a substantive due process claim that would have "thrust the Federal Judiciary into an area previously left to state courts and legislatures"); *see also, e.g., Poe* v. *Ullman*, 367 U.S. 497, 503 (1961).

Family law, including the definition of marriage, is "an area that has long been regarded as a virtually exclusive province of the States." *Windsor*, 133 S.Ct. at 2691 (quoting *Sosna* v. *Iowa*, 419 U.S. 393, 404 (1975)). "One of the principal areas in which the

United States Supreme Court has customarily declined to intervene is the realm of domestic relations." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 12 (2004); *see also Boggs* v. *Boggs*, 520 U.S. 833, 850 (1997); *Mansell* v. *Mansell*, 490 U.S. 581, 587 (1989); *Moore* v. *Sims*, 442 U.S. 415, 435 (1979).

Concern for federalism and the traditional authority of the States to define marriage was critical to this Court's decision in *Windsor*. *Windsor* emphasized that "[t]he recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens," and "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations." *Id.* "Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations." *Id.*

As *Windsor* observed, this deference to the States on matters such as the definition of marriage is particularly appropriate for the federal courts. "In order to respect this principle, the federal courts, as a general rule, do not adjudicate issues of marital status even when there might otherwise be a basis for federal jurisdiction." *Id.* "Federal courts will not hear divorce and custody cases even if they arise in diversity because of 'the virtually exclusive primacy ... of the States in the regulation of domestic relations.'" *Id.* (quoting *Ankenbrandt* v. *Richards*, 504 U.S. 689, 714 (1992) (Blackmun, J., concurring in the judgment)).

Thus, *Windsor* placed primary emphasis on the States' authority to define and regulate marriage as one of the deepest-rooted traditions of our system of

federalism. "The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning...." *Id.* "By history and tradition the definition and regulation of marriage ... has been treated as being within the authority and realm of the separate States." *Id.* at 2680. Under *Windsor*, DOMA was infirm because it failed to respect the States' "historic and essential authority to define the marital relation," and thus "depart[ed] from this history and tradition of reliance on state law to define marriage." *Id.* at 2692.

B. This Court Should Respect the Role of the States as Laboratories of Democracy and Defer to the Democratic Processes of the States.

Second, this Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Oregon* v. *Ice*, 555 U.S. 160, 171 (2009). "This Court should not diminish that role absent impelling reason to do so." *Id.* When "States are presently undertaking extensive and serious evaluation" of disputed social issues, "the challenging task of crafting appropriate procedures for safeguarding liberty interests is entrusted to the 'laboratory' of the States in the first instance." *Glucksberg*, 521 U.S. at 737 (O'Connor, J., concurring) (ellipses and quotation marks omitted) (quoting *Cruzan* v. *Dir., Mo. Dept. of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring)). In such cases, "the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."

Lopez, 514 U.S. at 581 (Kennedy, J., concurring). "[O]ne of the key insights of federalism is that it permits laboratories of experimentation—accent on the plural—allowing one State to innovate one way, another State another, and a third State to assess the trial and error over time." *DeBoer* v. *Snyder*, 772 F.3d 388, 406 (6th Cir. 2014).

Windsor asserted this same respect for the States as laboratories of democracy. This Court noted that leaving the debate about marriage to the states was "a proper exercise of sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." *Id.* at 2692. "The dynamics of state government in the federal system are to allow the formation of consensus" on such issues. *Id.*

Windsor reasoned that one key deficiency of the DOMA was that it sought to stifle just such innovation in the States as laboratories of democracy. *Windsor* asserted that "the congressional purpose" in enacting the bill was "to influence or interfere with state sovereign choices about who may be married . and influence a state's decision as to how to shape its own marriage laws." *Id.* (quotation marks omitted). Such purposeful stifling of state-level innovation was, in the Court's view, inconsistent with the States' role as laboratories of democracy. *See id.*

Such concern would make little sense if the Constitution required a particular definition of marriage in the first instance. *Windsor* presupposes the possibility of different definitions of marriage under state law, in accord with disparate democratic results. Thus, this Court described New York's legalization of same-sex marriage as "responding 'to

the initiative of those who [sought] a voice in shaping the destiny of their own times,'" rather than reflecting a federal constitutional command. *Id.* at 2692 (quoting *Bond*, 131 S. Ct. at 2364). Critically, this response arose "after a statewide deliberative process that enabled [the State's] citizens to discuss and weigh arguments for and against" the redefinition of marriage. *Id.* at 2689.

Citing the same sentence from *Bond*, a plurality of this Court in *Schuette* recently reaffirmed the capacity of democratic majorities to address even the most "difficult and delicate issues." *Schuette*, 134 S. Ct. at 1636 (plurality opinion). The *Schuette* plurality emphasized that the democratic "process is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues." *Id.* at 1637. "It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id.* In cases where the public seeks to resolve debates of such magnitude, the Court should avoid a judgment which would effectively "announce a finding that the past 15 years of state public debate on this issue have been improper." *Id.* Rather, "the Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates" about such challenging issues. *Id.* at 1649 (Breyer, J., concurring in the judgment).

The *Schuette* plurality expressed confidence in state democratic processes to mediate and address a divisive question of race relations—an issue no less "profound" and "divisive" than the definition of marriage. *Id.* at 1638. The *Schuette* plurality

observed that the democratic process was fundamental to development of conceptions of liberty: "[F]reedom does not stop with individual rights. Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation . " *Id.* at 1636. "Were the Court to rule that the question addressed by Michigan voters is too sensitive or complex to be within the grasp of the electorate . . . that holding would be an unprecedented restriction on the exercise of a fundamental right . . to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process." *Id.* at 1637.

Just like the respondents in *Schuette*, the petitioners in these cases "insist that a difficult question of public policy must be taken from the reach of the voters, and thus removed from the realm of public discussion, dialogue, and debate in an election campaign." *Id.* As in *Schuette*, this Court should conclude that petitioners' position "is inconsistent with the underlying premises of a responsible, functioning democracy." *Id.* "Democracy does not presume that some subjects are either too divisive or too profound for public debate." *Id.* at 1638.

C. The Scarcity of Clear Guideposts for Decisionmaking in this "Unchartered Area" Calls for Judicial Restraint.

Third, particular caution is appropriate when the courts are called upon to constitutionalize newly asserted liberty and equality interests. "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins*, 503 U.S. at 125; *see also Osborne*, 557 U.S. at 72 (same); *Glucksberg*, 521 U.S. at 720 (same). In *Glucksberg*, this Court reasserted the necessity of "rein[ing] in the subjective elements that are necessarily present in due-process judicial review," through reliance on definitions of liberty that had been "carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition." 521 U.S. at 722. "The elected governments of the States" are best equipped to steer a course in such "unchartered area[s]," and the federal judiciary therefore should not "place the matter outside the arena of public debate and legislative action." *Osborne*, 557 U.S. at 72-73 (quoting, in part, *Glucksberg*, 521 U.S. at 720).

The scarcity of "clear guideposts for responsible decisionmaking" is especially apparent when a party seeks to recast a longstanding fundamental right in light of some "new perspective." *Windsor*, 133 S. Ct. at 2689. It is particularly difficult to establish precise boundaries for any such right: "[T]he outlines of the 'liberty' specially protected by the Fourteenth Amendment" are "never fully clarified, to be sure,

and perhaps not capable of being fully clarified," and must be "carefully refined by concrete examples ... deeply rooted in our legal tradition." *Glucksberg*, 521 U.S. at 722.

The asserted redefinition of marriage to include same-sex couples raises similar concerns about how to draw principled boundaries for marriage as a distinct institution. If the boundaries of marriage are to be constitutionalized, federal courts will inevitably be called upon to determine whether other persons in personal relationships—including those whose cultures or religions may favor committed relationships long disfavored in American law—are likewise entitled to enjoy marital recognition. *See DeBoer*, 772 F.3d at 407 ("Any other approach would create line-drawing problems of its own . If it is constitutionally irrational to stand by the man-woman definition of marriage, it must be constitutionally irrational to stand by the monogamous definition of marriage.").

D. This Court Should Hesitate To Redefine Marriage When There Is No Close Nexus Between the Right Asserted and the Central Purpose of a Constitutional Provision.

In considering novel constitutional claims, this Court acts with maximal confidence, so to speak, when recognizing an equality or liberty interest that has a close nexus to the core purpose of an express constitutional provision. *See, e.g., DeBoer*, 772 F.3d at 403 ("All Justices, past and present, start their assessment of a case about the meaning of a constitutional provision by looking at how the

provision was understood by the people who ratified it."). For example, *Loving* v. *Virginia*, 388 U.S. 1, 2 (1967), invalidated "a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications." *Loving* emphasized from the outset that its decision "reflect[ed] the central meaning of th[e] constitutional commands" of the Fourteenth Amendment. *Id.* at 2. "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Id.* at 10. "[R]estricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.* at 12. *Loving* repeatedly stressed that laws against interracial marriage were repugnant to this "central meaning" and "clear and central purpose" of the Fourteenth Amendment. *See id.* at 6, 9, 10, 11.

Likewise, in invalidating the District of Columbia's ban on possession of operable handguns for self-defense, this Court devoted extensive historical analysis to establishing that "the inherent right of self-defense has been central to the Second Amendment right." *District of Columbia* v. *Heller*, 554 U.S. 570, 628 (2008). *Heller* repeatedly emphasized that the right of self-defense was the "central component" of the freedom guaranteed by the Second Amendment. *Id.* at 599; *see also id.* at 63 (describing "self-defense" as "the core lawful purpose" protected by the Second Amendment); *id.* at 634 (holding that firearm possession is the "core protection" of an "enumerated constitutional right").

In this case, by contrast, redefining the institution of marriage to encompass same-sex

couples cannot be viewed as falling within the "central meaning" or the "clear and central purpose" of the Fourteenth Amendment, or any other constitutional provision. *Loving*, 388 U.S. at 2, 10. Even if the asserted interest is defined broadly as the freedom to marry whom one chooses—a definition which begs the question as to how "marriage" is to be defined, which lies within the States' traditional authority—this liberty interest still lacks the same close and direct nexus to the core purpose of Fourteenth Amendment as was present in *Loving* and similar cases. "Nobody in this case ... argues that the people who adopted the Fourteenth Amendment understood it to require the States to change the definition of marriage." *DeBoer*, 772 F.3d at 403.

E. This Court Should Not Constitutionalize an Area of Active Debate and Legal Development in the States.

Further, this Court is hesitant to adopt a new constitutional norm not only when is there no national consensus on the issue, but when the issue is currently the subject of active debate and legal development in the States. For example, a compelling consideration in *Glucksberg* was the ongoing state-level consideration and legal development of the issue of physician-assisted suicide, through legislative enactments, judicial decisions, and ballot initiatives. *See* 521 U.S. at 716-19. *Glucksberg* observed that "the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other

similar issues." *Id.* at 719. "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society." *Id.* at 735; *see also id.* at 737 (O'Connor, J., concurring).

This Court's reluctance to interfere with ongoing debate and legal development in the States played a key role in *Cruzan* and *Osborne* as well. *Cruzan* conducted an extensive survey of recent developments in the law surrounding right-to-die issues that had occurred in the previous fifteen years. 497 U.S. at 269-77. It was telling that these developments reflected "both similarity and diversity in their approaches to decision of what all agree is a perplexing question." *Id.* at 277. *Cruzan* prudently declined to "prevent States from developing other approaches for protecting an incompetent individual's liberty interest in refusing medical treatment." *Id.* at 292 (O'Connor, J., concurring). "As [was] evident from the Court's survey of state court decisions" in *Cruzan*, "no national consensus has yet emerged on the best solution for this difficult and sensitive problem." *Id.*

Similarly, *Osborne* reviewed the diverse and rapidly developing approaches to the right of access to DNA evidence that were then current in the States, observing that "the States are currently engaged in serious, thoughtful examinations" of the issues involved. 557 U.S. at 62 (quoting *Glucksberg*, 521 U.S. at 719). *Osborne* emphasized that "[t]he elected governments of the States are actively confronting the challenges DNA technology poses to our criminal justice systems and our traditional

notions of finality. . To suddenly constitutionalize this area would short-circuit what has been a prompt and considered legislative response." *Id.* at 72-73. To "short-circuit," *id.*, would have been inappropriate because it would have "take[n] the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn[ed] it over to federal courts applying the broad parameters of the Due Process Clause." *Id.* at 56.

In this case, it is beyond dispute that the issue of same-sex marriage is the subject of ongoing legal development and "earnest and profound debate," *Glucksberg*, 521 U.S. at 735, in state legislatures, state courts, and state forums for direct democracy. "The public is currently engaged in an active political debate over whether same-sex couples should be allowed to marry." *Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2659 (2013). Over the past few years, to be sure, several States have opted to recognize same-sex marriages through the democratic process. But over the past 15 years, 31 States have enacted laws adopting the definition of marriage as one man and one woman. *See DeBoer*, 772 F.3d at 416 ("Freed of federal-court intervention, thirty-one States would continue to define marriage the old-fashioned way."). As recently as 2012, the voters of North Carolina approved the traditional definition of marriage by a margin of 61 to 39 percent. The issue is not one of national consensus, but one of "active political debate." *Hollingsworth*, 133 S. Ct. at 2659.

Notably, as the Sixth Circuit highlighted in *DeBoer*, even the European Court of Human Rights as concluded as recently as 2014 that, despite

changing social opinion on the nature of marriage, human rights laws do not guarantee a right to same-sex marriage. *Id.* at 417.

F. This Court Favors Incremental Change Over Sweeping and Dramatic Change In Addressing Novel Constitutional Claims.

Further, this Court's jurisprudence favors incremental change, and actively disfavors radical or sweeping change. Confronted, in *Cruzan*, with "what all agree is a perplexing question with unusually strong moral and ethical overtones," the Court emphasized the necessity of proceeding incrementally in such cases: "We follow the judicious counsel of our decision in *Twin City Bank* v. *Nebeker*, 167 U.S. 196, 202 (1897), where we said that in deciding 'a question of such magnitude and importance ... it is the [better] part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject.'" *Cruzan*, 497 U.S. at 277-78 (ellipsis and brackets added by the *Cruzan* Court). *See also, e.g.*, *Heller*, 554 U.S. at 635 ("[S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field.").

One notable exception to this Court's strong preference for incremental change was *Roe* v. *Wade*, 410 U.S. 113 (1973), which invalidated at a stroke the abortion laws of most States. But *Roe* was widely criticized for abandoning an incremental approach and failing to show appropriate deference to state-level democratic developments. "The political process was moving in the early 1970s, not

swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." Ruth Bader Ginsberg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 385-86 (1985). Indeed, *Roe* engendered enduring controversy because it "held unconstitutional Texas's (and virtually every other state's) criminal abortion statute" and replaced them with an opinion "drawing lines with an apparent precision one generally associates with a commissioner's regulations," despite the fact that "[t]he Constitution . . . simply says nothing, clear or fuzzy, about abortion." John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 927 (1973).

In this case, it is beyond dispute that a judicially mandated redefinition of marriage would impose sweeping, rather than incremental, change. It would impliedly invalidate the recent, democratically adopted policies of 31 States. Moreover, several States have opted for a more incremental approach, affording to same-sex couples forms of legal recognition other than marriage. Constitutional prudence dictates that this incremental, democratic process should be allowed to continue.

G. The Relative Novelty of Same-Sex Marriage Weighs Against the Mandatory Redefinition of Marriage.

In confronting new constitutional claims, this Court considers the novelty of the asserted claim, in

light of the Nation's history and tradition. "History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Lawrence* v. *Texas*, 539 U.S. 558, 572 (2003) (quoting *County of Sacramento* v. *Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)); *see also Glucksberg*, 521 U.S. at 721. Under this Court's cases, if the asserted claim is relatively novel, such novelty counsels against its recognition. By contrast, if the government's attempt to restrict a right is novel, in the face of a long tradition of unfettered exercise of that right, such a tradition weighs in favor of recognition.

This Court is most unwilling to recognize a new constitutional right when both the tradition of restricting the right has deep roots, and the decision to restrict it has recently been consciously reaffirmed. For example, *Glucksberg* noted that prohibitions on assisted suicide had been long in place, and that recent debate had caused the States to reexamine the issue and, in most cases, to reaffirm their prohibitions. *See Glucksberg*, 521 U.S. at 716 ("Though deeply rooted, the States' assisted suicide bans have in recent years been reexamined and, generally, reaffirmed.").

This Court is also averse to recognizing a constitutional right when the right is so newly asserted that there is no clearly established tradition on one side or the other. In *Osborne*, the asserted right of access to DNA evidence was so novel, due to the recent development of DNA technology, that there was yet no clear tradition in favor of or against it. "There is no long history of such a right, and 'the mere novelty of such a claim is reason enough to doubt that "substantive due process" sustains it.'"

Osborne, 557 U.S. at 72 (square brackets omitted) (*quoting Reno* v. *Flores*, 507 U.S. 292, 303 (1993)). *Cruzan* presented a similar case in which, due to the recent development of life-prolonging medical technology, legal consideration of the right to refuse such care had only recently "burgeoned" during the 12 years prior to the Court's decision. 497 U.S. at 270.

On the other hand, this Court has acted with greater confidence in extending constitutional protection when the governmental restriction at issue was novel, in the face of a long tradition of unfettered exercise of the right. In *Griswold* v. *Connecticut*, 381 U.S. 479, 498 (1965), for instance, the concept of criminal prosecution for the marital use of contraceptives had almost no antecedents in American law, and there was a longstanding *de facto* practice of availability and use of contraceptives in marriage. *See Griswold*, 381 U.S at 498 (Goldberg, J., concurring); *id.* at 505 (White, J., concurring in the judgment). Justice Harlan's dissent from the jurisdictional dismissal in *Poe* v. *Ullman* likewise emphasized the "utter novelty" of Connecticut's criminalization of marital contraception. 367 U.S. at 554 (Harlan, J., dissenting).

Lawrence confronted a very similar state of affairs as did *Griswold*. By 2003, conceptions of sexual privacy had become so firmly rooted that Texas's attempt to bring criminal charges against the petitioners for consensual sodomy had become truly anomalous. *Lawrence*, 539 U.S. at 571, 573. Even the handful of States that retained sodomy prohibitions exhibited a "pattern of non-enforcement with respect to consenting adults acting in private." *Id.* at 573.

Again, in *Romer* v. *Evans*, 517 U.S. 620 (1996), this Court repeatedly emphasized the novelty of the challenged provision's attempt to restrict the access of homosexuals to the political process. *Romer* noted that the state constitutional amendment at issue was "an exceptional . . form of legislation," which had the "peculiar property of imposing a broad and undifferentiated disability on a single named group." *Id.* at 632. *Romer*'s conclusion that "[i]t is not within our constitutional tradition to enact laws of this sort," drew support from its recognition that the "disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence." *Id.* at 633.

Legal recognition of same-sex relationships in the United States today bears no resemblance to the state of criminal enforcement of sodomy laws in *Lawrence*, or to the state of criminal penalties for the marital use of contraception in *Griswold*. Rather, this case bears closest resemblance to *Glucksberg*, where there had been a longstanding previous tradition prohibiting physician-assisted suicide, and where the policy against physician-assisted suicide had been the subject of recent active reconsideration, resulting in a reaffirmation of that policy in the majority of States. So also here, there has been a longstanding previous tradition of defining marriage as the union of one man and one woman. *Windsor*, 133 S. Ct at 2689 ("For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization."). Likewise, the policy of defining marriage as the union of a man and a woman has recently been reexamined and reaffirmed, during the

past 15 years, in the majority of States. *See DeBoer*, 772 F.3d at 416. This reaffirmation of marriage cannot plausibly be viewed as a novel intrusion into an area of liberty previously thought sacrosanct. Rather, this trend represents conscious reaffirmation of an understanding of marriage that was already deeply rooted. *Compare Glucksberg*, 521 U.S at 716.

Finally, it bears emphasizing that the proposition that laws—whether state or federal—defining marriage as one man and one woman are irrationally rooted in animus is untrue and unjust. This notion undermines the fundamental freedom to engage in a democratic process in which opposing views are treated with respect and fairness. Any attribution of malice is unbecoming, particularly in light of the fact that the overwhelming majority of governments, societies, and religions throughout human history have affirmed this traditional definition of marriage.

II. The States' Traditional Sovereignty Over Domestic Relations Includes the Power to Refuse to Recognize Out-of-State Marriages that Violate Local Public Policy.

One of the clearest incidents of the States' traditional authority over marriage and domestic relations is their authority to refuse to recognize marriages validly celebrated in other forums when those marriages violate local public policy.

Each State "has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created." *Sosna* v.

Iowa, 419 U.S. 393, 404 (1975) (quoting *Pennoyer* v. *Neff*, 95 U.S. 714, 734-35 (1878)). Though the default rule of interstate recognition is that a marriage valid where celebrated is valid everywhere, "it is well established that this general rule does not apply where recognition of a marriage is repugnant to public policy" of the forum state. *People* v. *Ezeonu*, 588 N.Y.S.2d 116, 117 (N.Y. Super. Ct. 1992). In fact, this public-policy exception is "as well established as the rule itself," and each State's "Legislature has, beyond all possible question, the power to enact what marriages shall be void in its own State, notwithstanding their validity in the State where celebrated . . ." *Pennegar* v. *State*, 10 S.W. 305, 306 (Tenn. 1888).

Thus, "[a] state undoubtedly has the power to declare what marriages between its own citizens shall not be recognized as valid in its courts, and it also has the power to declare that marriages between its own citizens contrary to its established public policy shall have no validity in its courts, even though they be celebrated in other states under whose laws they would ordinarily be valid." *Lanham* v. *Lanham*, 117 N.W. 787, 788 (Wis. 1908).

The States' traditional authority to refuse to recognize marriages celebrated in other forums is not, as some Petitioners suggest, a mere artifact of the era of invidious hostility to interracial marriages. Quite the contrary, the public-policy exception exists independent of, and long predates, that era. States have invoked this authority to refuse to recognize out-of-state marriages deemed void for various reasons of public policy. "Public policies invoked to deny recognition to foreign marriages support prohibitions against bigamy and

polygamy, consanguinity or affinity, nonage and certain instances of remarriage after divorce." Note, *Constitutional Constraints on Interstate Same-Sex Marriage Recognition*, 116 HARV. L. REV. 2028, 2035-36 (2003).

For example, both ancient and modern cases have invoked the public-policy exception to refuse to recognize bigamous or polygamous marriages, even though valid where celebrated. For example, in *People* v. *Ezeonu*, the court held that the polygamous marriage of a Nigerian national to his underage second wife was invalid under New York's public policy against polygamy, even though the marriage would have been valid where celebrated in Nigeria. 588 N.Y.S.2d at 118. Relying on the public-policy exception, *Ezeonu* held that "a polygamous marriage legally consummated in a foreign country will be held invalid in New York." *Id.* Other cases have come to the same conclusion, declining to recognize polygamous marriages that were valid where celebrated, on ground of public policy. *See, e.g., Ng Suey Hi* v. *Weedin*, 21 F.2d 801, 802 (9th Cir. 1927) (refusing to recognize the validity of a polygamous marriage celebrated in China); *In re Look Wong*, 4 Repts. of Causes Determined in U.S. Dist. Ct. Haw. 568 (1915) (refusing to recognize the validity of a polygamous marriage contracted by a U.S. national in China); *see also Incuria* v. *Incuria*, 280 N.Y.S. 716, 721 (N.Y. Fam. Ct. 1935) ("If a citizen of a foreign State, in which State polygamy is legal, would bring his half dozen or so legal wives to our country, the marriage of the six spouses to the one spouse would not be considered legal or valid by us.").

Similarly, state courts frequently have refused to recognize marriages validly celebrated in other

States where the parties were too closely related by blood or affinity, in violation of the forum State's policy against incest. *See, e.g., Catalano* v. *Catalano*, 170 A.2d 726, 728-29 (Conn. 1961) (refusing to recognize the marriage of an uncle and niece validly contracted in Italy); *Meisenhelder* v. *Chicago & N.W.R. Co.*, 213 N.W. 32, 33-34 (Minn. 1927) (holding that a marriage of first cousins validly contracted in Kentucky was void under the public policy of Illinois); *U.S. ex Rel. Devine* v. *Rodgers*, 109 F. 886, 888 (E.D. Pa. 1901) (holding that an uncle-niece marriage validly contracted in Russia was void under Pennsylvania law).

State courts have also declined recognition to out-of-state marriages involving parties that were underage according to the law of the forum. *See, e.g., Wilkins* v. *Zelichowski*, 140 A.2d 65, 68 (N.J. 1958) (refusing to recognize the marriage of a 16-year-old contracted in Indiana on the ground that New Jersey required 18 years of age for a valid marriage contract); *Sirois* v. *Sirois*, 50 A.2d 88, 89 (N.H. 1946) (holding that the marriage in Massachusetts of a 15-year-old was invalid in New Hampshire); *Ross* v. *Bryant*, 217 P. 364, 366 (Okla. 1923) (holding that an underage marriage contracted in Arkansas was invalid in Oklahoma); *Mitchell* v. *Mitchell*, 99 N.E. 845, 848 (N.Y. 1912) (holding that an underage marriage contracted in New Jersey was invalid in New York).

In addition, courts often have refused to recognize the validity of marriages executed in violation of the forum State's restrictions on remarriage after divorce. *See, e.g., Henderson* v. *Henderson*, 87 A.2d 403, 409 (Md. 1952); *Maurer* v. *Maurer*, 60 A.2d 440, 443 (Pa. Super. Ct. 1948);

Lanham v. *Lanham*, 117 N.W. 787, 788 (Wis. 1908); *Pennegar* v. *State*, 10 S.W. 305, 308 (Tenn. 1888); *Thorp* v. *Thorp*, 90 N.Y. 602 (N.Y. 1882).

In short, the public-policy exception to the place-of-celebration rule is just as longstanding and well established as the rule itself. Petitioners, in effect, ask this Court to constitutionalize the place-of-celebration rule for same-sex marriages. But this Court previously has declined to "embark upon the enterprise of constitutionalizing choice-of-law rules, with no compass to guide us beyond our own perception of what seems desirable." *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 727-28 (1988). Rather, the only constitutional restriction that this Court has imposed on a forum State's application of its own law is the modest requirement that the forum have "significant contact or a significant aggregation of contacts" to the transaction, "creating state interests." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 821 (1985) (quoting *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302, 313 (1981)). The State in which a couple is domiciled unquestionably possesses the requisite contacts with the marriage to justify applying its own law to determine the marriage's validity, because "[d]omicile . . . is the paramount 'interest-creating contact' between a state and a marriage." *Constitutional Constraints*, 116 HARV. L. REV. at 2036; *see also Wilkins*, 140 A.2d at 68.

Moreover, the petitioners' view that every State must recognize the validity of a same-sex marriage celebrated in another State would violate fundamental principles of federalism. It would allow partners to evade the restrictions of the forum State simply by eloping to a neighboring State that lacks the same restrictions. This rule would permit each

State, in effect, to project its marriage policy into all neighboring States, forcing uniformity instead of permitting federal diversity.

In sum, the States' traditional sovereignty over marriage and domestic relations plainly encompasses the authority of a State to refuse to recognize the validity of marriages that were validly enacted in other jurisdictions. This rule is "as old as the Republic." *Sun Oil Co.*, 486 U.S. at 730. "If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Id.* (quoting *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922)).

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Principles of federalism and judicial restraint strongly counsel this Court to refuse to impose a federally mandated redefinition of the ancient institution of marriage on the fifty States. Rather, the States and their People should decide these issues through their democratic processes. The Sixth Circuit's judgment should be affirmed.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court affirm the judgment of the court below.

Respectfully submitted,

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April 3, 2015

APPENDIX

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Full list of *amici curiae*, including their institutional affiliations.....1a

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1. Senator Ted Cruz of Texas
2. Senator Steve Daines of Montana
3. Senator James Lankford of Oklahoma
4. Senator James Inhofe of Oklahoma
5. Senator Mitch McConnell of Kentucky
6. Senator Tim Scott of South Carolina
7. Representative Robert B. Aderholt of Alabama, 4th Congressional District
8. Representative Rick W. Allen of Georgia, 12th Congressional District
9. Representative Mike Bishop of Michigan, 8th Congressional District
10. Representative Marsha Blackburn of Tennessee, 7th Congressional District
11. Representative Jim Bridenstine of Oklahoma, 1st Congressional District
12. Representative Michael K. Conaway of Texas, 11th Congressional District
13. Representative Kevin Cramer of North Dakota, At-Large
14. Representative John Abney Culberson of Texas, 7th Congressional District
15. Representative Jeff Duncan of South Carolina, 3rd Congressional District
16. Representative Stephen Fincher of Tennessee, 8th Congressional District
17. Representative John Fleming of Louisiana, 4th Congressional District
18. Representative Bill Flores of Texas, 17th Congressional District
19. Representative J. Randy Forbes of Virginia, 4th Congressional District

20. Representative Virginia Foxx of North Carolina, 5th Congressional District
21. Representative Trent Franks of Arizona, 8th Congressional District
22. Representative Scott Garrett of New Jersey, 5th Congressional District
23. Representative Louie Gohmert of Texas, 1st Congressional District
24. Representative Bob Goodlatte of Virginia, 6th Congressional District
25. Representative Paul A. Gosar of Arizona, 4th Congressional District
26. Representative Glenn Grothman of Wisconsin, 6th Congressional District
27. Representative Andy Harris of Maryland, 1st Congressional District
28. Representative Vicky Hartzler of Missouri, 4th Congressional District
29. Representative Jody B. Hice of Georgia, 10th Congressional District
30. Representative Richard Hudson of North Carolina, 8th Congressional District
31. Representative Tim Huelskamp of Kansas, 1st Congressional District
32. Representative Randy Hultgren of Illinois, 14th Congressional District
33. Representative Walter B. Jones of North Carolina, 3rd Congressional District
34. Representative Jim Jordan of Ohio, 4th Congressional District
35. Representative Mike Kelly of Pennsylvania, 3rd Congressional District
36. Representative Steve King of Iowa, 4th Congressional District

37. Representative Raúl R. Labrador of Idaho, 1st Congressional District
38. Representative Doug LaMalfa of California, 1st Congressional District
39. Representative Doug Lamborn of Colorado, 5th Congressional District
40. Representative Mark Meadows of North Carolina, 11th Congressional District
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42. Representative Markwayne Mullin of Oklahoma, 2nd Congressional District
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47. Representative Stevan Pearce of New Mexico, 2nd Congressional District
48. Representative Joseph R. Pitts of Pennsylvania, 16th Congressional District
49. Representative Keith J. Rothfus of Pennsylvania, 12th Congressional District
50. Representative David Rouzer of North Carolina, 7th Congressional District
51. Representative Steve Russell of Oklahoma, 5th Congressional District
52. Representative Christopher H. Smith of New Jersey, 4th Congressional District
53. Representative Tim Walberg of Michigan, 7th Congressional District

54. Representative Randy K. Weber, Sr. of Texas, 14th Congressional District
55. Representative Ted S. Yoho of Florida, 3rd Congressional District
56. Representative Ryan K. Zinke of Montana, At-Large
57. Representative Pete Sessions of Texas, 32nd Congressional District